

**QUARTERLY ATTORNEY REPORT  
GENERAL DISTRICT  
April 2004**

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**TO:** CRWCD BOARD OF DIRECTORS

**FROM:** PETER C. FLEMING, GENERAL COUNSEL  
JILL C.H. MCCONAUGHY, ASSOCIATE COUNSEL  
KIRSTIN E. MCMILLAN, STAFF COUNSEL

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Dear Directors:

This report identifies matters for discussion at the River District's April 20-21, 2004, meeting. A separate Confidential Report (Attachment A) addresses confidential matters. The information in this report is current as of April 8, 2004, and will be supplemented as necessary before or at the Board meeting.

**I. EXECUTIVE SESSION**

The following is a list of matters that qualify for discussion in executive session pursuant to C.R.S. §§ 24-6-402(4)(b), 4(e), and 4(f).

- A. C-BT Litigation, Green Mountain Reservoir, Federal District Court.
- B. Windy Gap Firing Project.
- C. Blue River Decree - Negotiations with Denver and Summit County and other Blue River Decree Administrative Issues.
- D. Denver's North-End/Moffat Tunnel Collection System Project.
- E. Shoshone Power Plant - Call Reduction Issues.
- F. City of Golden (Vidler Tunnel Company) v. Simpson, Case No. 03CW176, Water Division 5.
- G. SECWCD's Application to Make First Enlargement of Boustead Tunnel Absolute, Case No. 02CW324, and Application for Second Enlargement of Boustead Tunnel, Case No. 02CW365, Water Division 5.
- H. CRWCD Diligence Application, Case No. 03CW41, Water Division 5.

- I. CRWCD Diligence Deadline for Water Division 6 (Yampa River Basin) Conditional Water Rights.
- J. Black Canyon National Monument:
  - 1. Federal Reserved Right, Case No. 01CW05, Water Division 4.
  - 2. Case No. 03SA321, Appeal to Colorado Supreme Court of Order on Stay in Case No. 01CW05.
  - 3. TU/WRA Federal Lawsuit regarding Black Canyon Reserved Right, Case No. 03-WY-1712.
  - 4. CWCB's Instream Flow Claim for the Black Canyon, Case No. 03CW265, Water Division 4.
- K. City of Longmont RICD Application, Case No. 01CW275, Water Division 1.
- L. Special Counsel - Potential Conflict Matter.
- M. Personnel Matters.
- N. Aspinall Unit EIS Process and Yield Issues.

## **II. GENERAL & GOVERNANCE MATTERS**

### **A. Sale of River District's Lot 4, Devereux Road, and Fulfillment of the Agreement with the Warners Regarding the Terminated Contract for the Sale of Lot 4, Devereux Road.**

We are pleased to report that in accordance with the December 22, 2003, purchase and sale contract, the River District sold Lot 4, Devereux Road to Cody Henry on March 18, 2004, for the sum of \$425,000.00. In accordance with our December 22, 2003, letter agreement with Rick and Kathie Warner, we refunded to the Warners \$3,526.50 of their earnest money deposit immediately following the closing. The River District retained \$1,473.50 of the Warners' earnest money deposit to cover our out-of-pocket expenses.

### **B. Water Quality.**

A separate memorandum on water quality matters is included in your Board material as Attachment B. The Board may be particularly interested in the summary in that memo of the Supreme Court's recent decision in the *Miccosukee* case.

### **C. Meetings with State Officials.**

On February 12<sup>th</sup>, Eric Kuhn and Peter Fleming met with the Colorado Attorney General, Ken Salazar, and the new Director of the Department of Natural Resources, Russell George (separate meetings) to discuss some of the important issues currently facing the River District, including the Green Mountain Reservoir/Heeney Slide lawsuit, the Windy Gap Firing Project, the Aspinall Unit Environmental Impact Statement ("EIS") process, and the "South Metro" water supply needs.

### **III. WATER MATTERS BY BASIN**

#### **A. Colorado River Basin.**

##### **1. C-BT Litigation, Green Mountain Reservoir, Federal District Court.**

We continue to wait for a decision by Judge Nottingham on (1) the Motions to Dismiss that were filed by the United States and the Northern Colorado Water Conservancy District last year, and (2) the Motion to Intervene filed by the State of Colorado. *There is additional discussion on the Heeney Slide issue in the Confidential Report, and the Board may wish to discuss the matter in Executive Session.*

##### **2. Windy Gap Firing Project.**

In February, the U.S. Bureau of Reclamation ("USBR") granted the request of Grand County to be a "cooperating agency" in the Windy Gap Firing Project NEPA review process. This will provide Grand County with greater input in the process and should provide an opportunity to review preliminary drafts of the NEPA documents.

At the end of February, Chris Treese and Peter Fleming traveled to Washington, D.C. to meet with the State's congressional representatives about the Windy Gap Firing Project, among other issues. Director Newberry and his fellow Grand County Commissioner, Duane Dailey, accompanied Chris and Peter to several meetings. We had a productive meeting with Commissioner Keys and other high-level USBR personnel. Commissioner Keys indicated that he had requested that the Department of Interior Solicitor's Office prepare a Solicitor's Opinion on the legality of the Municipal Subdistrict's proposal to "pre-position" C-BT Project water in a new non-federal reservoir on the Front Range. Each of you should have received Peter Fleming's March 22, 2204, letter to the Regional Solicitor's Office regarding pre-positioning and the Windy Gap Firing Project. We are waiting to receive the Solicitor's Opinion. *The Board may wish to discuss any new developments in executive session.*

##### **3. Blue River Decree - Negotiations with Denver and Summit County and other Blue River Decree Administrative Issues.**

We last reported that our monthly negotiations with Denver and Summit County on Blue River Decree compliance issues were finally becoming more substantive. Unfortunately, the negotiations have not made substantial progress, in part due to Denver's concern about certain Blue River Decree accounting issues regarding the legal (*i.e.*, "paper") fill versus the actual physical fill of Green Mountain Reservoir. These issues are discussed further in the Confidential Report. *We recommend that the Board discuss the issue in executive session.*

**4. Denver's North-End/Moffat Tunnel Collection System Project.**

We reported above that the USBR granted the request of Grand County to be a cooperating agency in the NEPA review process for the Windy Gap Firming Project. In contrast, the Corps of Engineers (the lead agency for Denver's project) rejected Grand County's request to be a cooperating agency in the NEPA review process for Denver's improvement project. In part due to this rejection, Grand County and Denver are negotiating an intergovernmental agreement that would provide Grand County with some of the rights in the NEPA process that it would have secured by being a cooperating agency; however, it remains to be seen whether the parties can reach an acceptable agreement. *The Board may wish to discuss this matter in executive session.*

**5. Shoshone Power Plant - Call Reduction Issues.**

This matter is discussed in the Confidential Report.

**6. City of Golden (Vidler Tunnel Co.) v. Simpson, Case No. 03CW176, Water Division 5.**

We previously reported that this case (1) concerns the right of Golden to divert its junior Vidler Tunnel rights before it fully exercises its senior rights for the tunnel, and (2) tangentially raises complicated issues about Golden's ability to divert the Vidler Tunnel rights as against the senior water rights for Dillon and Green Mountain Reservoirs. On February 12, 2004, the Division 5 Water Court entered an order requiring that the parties publish their amended pleadings in the Division 5 Water Resume so that interested parties could file Statements of Opposition and participate in the case. We support the ability of all interested parties to participate in the case, but we (and other entities) were concerned about the potential quagmire that might result if the second issue (diversion of Vidler's rights against the fill of Dillon and Green Mountain Reservoirs) were litigated in the Division 5 Water Court. We therefore requested that a meeting of interested parties be held prior to the republication in an effort to resolve the second issue to the greatest extent possible. A meeting was held in March among the River District, Denver, Golden, and the Division 5 Engineer's Office, and we are hopeful that current negotiations resulting from that meeting will resolve the second issue. *We anticipate that there will be more to report at the Board meeting. The Board may wish to discuss this matter in executive session.*

**7. Southeastern Colorado Water Conservancy District's Application to Make Absolute the First Enlargement of the Boustead Tunnel, Case No. 02CW324, and Application for Second Enlargement of Boustead Tunnel Water Right, Case No. 02CW365, Water Division 5.**

As previously reported, these cases involve claims of the Southeastern Colorado Water Conservancy District ("SECWCD") to make absolute the remaining portion of the first enlargement to the transmountain Boustead Tunnel component of the Fry-Ark Project and to adjudicate an absolute right to a second enlargement of the tunnel, for a total capacity of 1,030 c.f.s. We met with

representatives of the SECWCD, the USBR, and our co-Objectors (the Town of Basalt, the Basalt Water Conservancy District, and the City of Aspen) in Denver on January 23<sup>rd</sup> to discuss these cases. The City of Aspen is concerned about a related issue regarding the operation of the Fry-Ark/Twin Lakes exchange – by which the Twin Lakes Reservoir and Canal Company bypasses up to 3,000 acre-feet of water from its West Slope diversions and is repaid for those bypasses on the Front Range. For this reason, representatives of Twin Lakes also attended the meeting.

It is our position that the original 900 c.f.s. right of the Boustead Tunnel and the storage right of Ruedi Reservoir share a co-equal priority, which is reflected in the State Engineer's water rights tabulation. Our initial concern in these cases was to ensure that the junior enlargement claims for the Boustead Tunnel are administered in accordance with the priority system, so that the fill of Ruedi Reservoir will be essentially guaranteed before the junior Boustead Tunnel rights can be diverted. At the meeting, Brian Person of the USBR stated that the Fry-Ark Project is operated to avoid carriage of greater than 945 c.f.s. through the Boustead Tunnel. The SECWCD's claim for the second enlargement and its claim to make the additional first enlargement absolute therefore are called into question.

The SECWCD pledged to provide us with a conceptual level settlement proposal prior to the River District's Board meeting. We are scheduled to meet again on Tuesday, April 13<sup>th</sup> and will have more information to report at the April Board meeting. *The Board may wish to discuss these cases in executive session.*

**8. Southeastern Colorado Water Conservancy District's Preferred Storage Options Plan.**

*David Hallford plans to attend a portion of the Board's executive session to discuss issues related to the SECWCD's Preferred Storage Options Plan ("PSOP").*

**9. River District's Diligence Application, Case No. 03CW41, Water Division 5.**

We filed this diligence application on over 45 water rights at the end of February 2003. We are working to resolve the concerns of the three objectors, MidCon Realty, Eleanor Ruchti (pro se) and Nancy Allen (pro se). MidCon owns water rights in the Coal Creek Basin (tributary to the Crystal River) that are junior to the River District's West Divide Project water rights. The River District's engineering staff has analyzed the potential effects of the West Divide Project water rights on MidCon's water rights, and a possible settlement strategy is discussed in the Confidential Report. The pro se objectors own property on the White River and are concerned that the Strawberry Creek Pipeline would exacerbate erosion problems on their property by increasing the amount of water in the White River. We have tried to alleviate their concerns by informing them that the Strawberry Creek Pipeline is a pumping pipeline that would remove, not add, water from the White River during the spring run-off, but we have not received any response. We received the Division Engineer's summary of consultation which raised a number of minor concerns, and we are working on a

response. We have also circulated a proposed decree to the co-applicants. *We recommend that the Board discuss this matter in executive session.*

**10. Aurora's Lease of Water from the Climax Mine.**

For the second year in a row, Aurora proposes to lease a substantial amount of water from the Climax Mine. The water leased by Climax is the same water to which the River District has a right of first refusal for any sale. (Climax has stated that the rights are not currently for sale – only for lease.) Up to 5,000 acre feet of water will be released or otherwise delivered by Climax down Ten Mile Creek and transported by Denver through the Roberts Tunnel into the South Platte River basin. Denver will receive 20% of the leased water as a condition of Aurora's use of the Roberts Tunnel.

On February 25, 2004, the River District filed a letter objecting to the lease similar to the letter we filed for last year's lease. The Middle Park Water Conservancy District and the Northern Colorado Water Conservancy District also filed similar letters of concern about the lease. Our primary concern is that the lease not interfere with the fill of Green Mountain Reservoir. Some of Climax's rights are tabulated by the State Engineer as senior to Green Mountain Reservoir but some of the rights are tabulated as junior. (Climax disputes that any of the rights should be tabulated as junior to Green Mountain Reservoir.) Climax, Aurora, and Denver each has provided assurances that this year's lease involves only those rights that are tabulated as senior to Green Mountain Reservoir, so we have no remaining objection to this year's lease. We plan to monitor the accounting and actual delivery of the water.

**B. Yampa and White River Basins.**

**1. CRWCD Diligence Deadline for Water Division 6 (Yampa River Basin) Conditional Water Rights.**

Applications for findings of reasonable diligence are due before the end of June for a large portfolio of conditional water rights owned by the River District in Water Division 6. A detailed confidential memo on the conditional rights is included in your Board material as Attachment C. *We recommend that the Board discuss this matter in executive session.*

The specific rights that are due for diligence are as follows:

**a. Great Northern Project.**

The Great Northern Project is located in Moffat and Routt Counties. It includes the diversion, storage, and distribution of water on Elkhead Creek (California Park Reservoir, Elkhead Canal, Elkhead Lateral) and Fortification Creek (Rampart Reservoir and Hansen Canal). The decreed purposes of the Great Northern Project are: irrigation, domestic, stock watering, municipal, industrial, power, recreational and other beneficial uses and purposes.

<b>Elkhead Creek Portion</b>		
<u>Structure</u>	<u>Original Decree</u>	<u>Amount</u>
California Park Reservoir	C.A. 2259 (5/30/72)	36,536.1 AF (less 13,800 AF transferred to Craig)
Elkhead Canal	C.A. 2259 (5/30/72)	145 cfs
North Elkhead Feeder Canal	C.A. 2259 (5/30/72)	145 cfs
Elkhead Lateral	C.A. 2259 (5/30/72)	40 cfs

<b>Fortification Creek Portion</b>		
<u>Structure</u>	<u>Original Decree</u>	<u>Amount</u>
Rampart Reservoir	C.A. 2259 (5/30/72)	12,133.3 AF
Hansen Canal	C.A. 2259 (5/30/72)	70 cfs

**b. Grouse Mountain Reservoir.**

Grouse Mountain Reservoir was originally decreed on May 30, 1972 in Case No. C.A. 3926 for 79,262.4 acre-feet to be used for irrigation, domestic, stock watering, municipal, industrial, and recreational purposes with an appropriation date of June 4, 1963. The reservoir site is located about 20 miles north of Steamboat Springs on Willow Creek, about 3 miles upstream of the confluence with the Elk River.

**c. Hayden-Mesa Project.**

The Hayden-Mesa Project is located in Routt County and was originally intended to provide irrigation water to 23,000 acres of land south of the Yampa River between Craig and Mt. Harris.

<u>Structure</u>	<u>Original Decree</u>	<u>Amount</u>
Dunkley Reservoir	C.A. 4000 (5/30/72)	57,085.8 AF
East Fork Feeder Canal	C.A. 2259 (5/30/72)	475 cfs
Hayden Bench Canal	C.A. 4000 (5/30/72)	390 cfs
Twenty Mile Park Canal	C.A. 4000 (5/30/72)	45 cfs

**d. Juniper-Cross Mountain Project.**

The Juniper-Cross Mountain Project is located in Moffat County. It includes Juniper Reservoir and Cross Mountain Reservoir on the mainstem of the Yampa River, upstream of the confluence with the Little Snake River. Cross Mountain Reservoir is often considered as an after bay for the Juniper Reservoir power plant, but it could be developed independently. The decreed purposes of the Juniper-Cross Mountain Project are: irrigation, domestic, municipal, stock watering, industrial, power generation, piscatorial, and recreation.

<b>Juniper Project</b>		
<u>Structure</u>	<u>Original Decree</u>	<u>Amount</u>
Juniper Reservoir	C.A. 1278 (6/22/62)	825,294 AF
Juniper Reservoir Enlargement	W-771 (4/22/75)	235,700 AF
Juniper Reservoir Second Fill	81CW262 (3/15/82)	1,006,768 AF
Juniper Power Plant	C.A. 1278 (6/22/62)	1,000 cfs
Juniper Power Plant and Penstock Enlargement	79CW195 (9/3/81)	5,000 cfs
Juniper Power Plant and Penstock Second Enlargement	79CW205 (12/11/81)	1,000 cfs
Deadman Bench Canal (Sunbeam & Pinyon Laterals)	C.A. 1278 (9/1/60)	550 cfs



<b>Cross Mountain Project</b>		
<u>Structure</u>	<u>Original Decree</u>	<u>Amount</u>
Cross Mountain Reservoir	W-772 (4/22/75)	142,000 AF
Cross Mountain Reservoir Enlargement	79CW194 (9/3/81)	66,000 AF
Cross Mountain Reservoir Second Fill	81CW265 (3/15/82)	125,500 AF
Cross Mountain Penstock and Power Plant	W-792 (5/30/75)	2,200 cfs
Cross Mountain Penstock and Power Plant Enlargement	79CW196 (9/3/81)	3,100 cfs

**e. Savery-Pot Hook Project.**

The Savery-Pot Hook Project is located in Moffat County, Colorado and Carbon County, Wyoming and was originally studied by the U.S. Bureau of Reclamation as a supplemental water supply project for the Little Snake River Basin. It includes Pot Hook Reservoir on Slater Creek in Colorado and Savery Reservoir on Savery Creek in Wyoming. The River District owns the water rights for the Pot Hook portion of the project and the canals that would be in Colorado. The decreed purposes of the Pot Hook Project are: irrigation, domestic, stock watering, replacement and exchange, recreation, fish and wildlife, and flood control.

<u>Structure</u>	<u>Original Decree</u>	<u>Amount</u>
Pot Hook Reservoir	C.A. 1598 (6/23/64)	73,580.6 AF
Pot Hook Reservoir Enlargement	C.A. 2504 (5/30/72)	100,000 AF
Pot Hook Canal	C.A. 1598 (6/23/64)	260 cfs
Pot Hook Canal Enlargement	C.A. 2504 (5/30/72)	400 cfs
Two Bar Canal	C.A. 2269 (5/27/72)	100 cfs
Boone Lateral	C.A. 2269 (5/27/72)	16 cfs
Deer Lodge Lateral	C.A. 2269 (5/27/72)	23 cfs

**2. City of Steamboat Springs, RICD Application, Case No. 03CW86, Water Division 6.**

The City of Steamboat Springs filed an application in December 2003 for a Recreational In-Channel Diversion ("RICD") for a whitewater park. Pursuant to the Board's direction, we negotiated agreements with Steamboat Springs, the Upper Yampa Water Conservancy District, and Trout Unlimited providing that they will not oppose a motion to intervene filed by the River District within 30 days of when the case becomes "at issue" under the procedural rules for water court actions. The Colorado Water Conservation Board ("CWCB") declined to sign the agreement, indicating that it would like the River District to become a party. The case is scheduled to be at issue on June 8, 2004, meaning that the River District would have to file a motion to intervene no later than July 8, 2004, in order to ensure no opposition from the parties that signed the agreement. (Parties that did not sign would be free to oppose the River District's intervention at any time.) We do not plan to seek intervention absent specific direction from the Board.

The CWCB will hold a hearing on the claimed RICD as part of its May meeting (the hearing is scheduled for May 26-27, 2004). We do not plan to participate.

**3. River District's Diligence Decrees for Rampart Reservoir, Second Fill, Case No. 03CW24, and Pot Hook Reservoir, Second Fill, Case No. 03CW30, Water Division 6.**

We are pleased to report that on January 26, 2004, the Water Judge for Water Division 6 entered decrees finding that the River District exercised reasonable diligence in the development of the conditional storage rights for Rampart Reservoir, Second Fill and Pot Hook Reservoir, Second Fill. The conditional rights therefore are continued in full force and effect. Copies of the court's decrees are included in your Board packet as Attachments D and E, respectively.

The next diligence applications for these conditional rights are due in January of 2010. If the Board intends to maintain the Rampart Reservoir, Second Fill and Pot Hook Reservoir, Second Fill water rights, it should direct the River District staff to undertake site-specific work during the diligence period towards the development of the conditional rights so that the River District can make the rights absolute or, in the alternative, demonstrate diligence in its 2010 applications. Failure to undertake site-specific work during the diligence period may result in the court's canceling the River District's conditional rights.

**4. Update on Three Forks Ranch v. The City of Cheyenne and The Wyoming Water Development Commission.**

You may recall that Three Forks Ranch appealed the federal district court's dismissal of its complaint against the City of Cheyenne and the Wyoming Water Development Commission and the Wyoming State Engineer concerning the operation of Cheyenne's transmountain diversion project out of the Little Snake River basin. We filed amicus briefs generally supportive of Three Forks Ranch in both the trial court and appellate proceedings. On March 8, 2004, the federal Tenth Circuit Court of Appeals heard oral arguments on the appeal. Only thirty minutes was allowed for the entire oral argument, so we did not seek to take any of Three Forks' allotted time to reiterate our own arguments (it's unlikely that any request by the River District would have been granted). We do not expect the Tenth Circuit Court to rule on the appeal prior to the Board meeting (it could be many months), but we will report to the Board when an opinion is issued.

**C. Gunnison River Basin.**

**1. Black Canyon Litigation.**

**a. Reserved Rights Application, Case No. 01CW05, Water Division 4 and Case No. 03SA321, Colorado Supreme Court.**

As discussed at the January Board meeting, the Colorado Supreme Court granted the procedural part of the C.A.R. 21 Petition filed by the River District and other parties, including the CWCBC, State Engineer, Colorado River Energy Distributors Association ("CREDA"), and the Upper Gunnison River Water Conservancy District, thereby agreeing to hear the petitioners' request that the court reverse the water court's order staying the proceedings in Case No. 01CW05.

As the Board may remember, the supreme court granted the United States and the Environmental Opposers additional time to file their respective answer briefs. Both parties filed their briefs on January 26, 2004. In its answer brief, the United States argued that while it opposed the water court's grant of stay and continues to believe that the stay was unnecessary, it does not believe that the stay amounted to an abuse of discretion warranting relief from the supreme court. In their answer brief, the Environmental Opposers argued that the water court did not abdicate its jurisdiction and that their need for the stay outweighs any prejudice to the petitioners. The River District and other petitioners filed a reply brief on March 11, 2004 (completing the legal briefs before the supreme court). In the reply, we argued that the water court's stay does constitute an abuse of discretion because the stay (1) leaves the petitioners without an adequate remedy in the proper forum (the Colorado water court), (2) facilitates the improper removal to federal court of an issue reserved to the state water court, and (3) causes petitioners prejudicial delay and inconvenience.

We hope to receive a ruling from the supreme court on the C.A.R. 21 Petition soon.

**b. Federal Complaint of Environmental Groups, Case No. 03-WY-1712.**

The parties to the federal lawsuit are awaiting a decision by the federal court on the United States' motion to dismiss the environmental groups' amended complaint. On January 15, 2004, the environmental groups filed a response to the motion to dismiss, wherein they argued that their amended complaint properly alleges claims for (1) failure to act pursuant to the National Park Service Act ("NPSA") and the Black Canyon Act ("BCA") in violation of the Administrative Procedures Act, (2) abandoning federal water rights in violation of the NPSA and the BCA, (3) NEPA violations, (4) unauthorized disposition of federal property, and (5) unlawful delegation of federal obligations to the state. On February 17, 2004, the United States, joined by the state intervenors (Colorado Farm Bureau, Colorado State Engineer, Colorado Division of Wildlife, CWCB and CREDA), filed their reply in support of the motion to dismiss. The United States and intervenors argued that dismissal is required because (1) the federal court lacks jurisdiction over the discretionary actions of the United States to resolve pending litigation, (2) the Secretary of Interior has discretion to determine the interrelationship between the park and the Aspinall Unit, (3) the court lacks jurisdiction over the alleged failure to act pursuant to the NPSA and the BCA, (4) the environmental groups have not demonstrated that NEPA applies to the challenged action, and (5) the court cannot review the unauthorized disposition of federal property claim or the unlawful delegation claim.

On March 17, 2004, the court heard oral arguments on the United States' motion to dismiss via telephone. The judge said he was leaning towards denying the motion to dismiss and would issue a ruling very soon. The judge also indicated the trial would not occur in May as previously scheduled, but the court might use that time to hear arguments on motions for summary judgment. As of the date of this memorandum, a ruling has not been issued.

**c. CWCB Appropriation of Peak Instream Flow for the Black Canyon, Case No. 03CW265, Water Division 4.**

In late December, the CWCB filed an application (Case No. 03CW265) to adjudicate the instream flow for the Black Canyon that appears to be consistent with the findings adopted by the CWCB at its November 19, 2003, hearing. As directed by the Board, we filed a statement of opposition in order to monitor the case and support the CWCB's efforts to implement the April 2, 2003, MOA. The United States, the City of Delta, Redlands Water and Power Company, the Upper Gunnison River Water Conservancy District, CREDA, the Crystal Creek Homeowners Association, Parker Water and Sanitation, Trout Unlimited and Western Resources Advocates also filed statements of opposition. No further action has occurred in the case.

*It is possible that a ruling may be entered by the Colorado Supreme Court or the federal district court prior to the Board meeting, and the Board may wish to discuss the ramifications of any such ruling or order in executive session.*

**2. CWCB's Appeal of Upper Gunnison River Water Conservancy District RICD Decree, Case No. 02CW38, Water Division 4, to the Colorado Supreme Court, Case No. 04SA44.**

As previously reported, the Division 4 Water Court granted in full the UGRWCD's application for a RICD on the Gunnison River. In late February, the CWCB, joined by the State Engineer and Division Engineer for Water Division No. 4 ("State"), appealed the decree to the Colorado Supreme Court. The following issues were raised in the notice of appeal:

- a. Whether the water court erred in holding that the terms "minimum stream flow" for a "reasonable recreation experience" are not to be given separate and distinct meaning from pre-216 statutory terms, such as "reasonableness," "waste," and "speculation."
- b. Whether the water court erred in holding there is a constitutional right to appropriate and determine "precisely the size and scope" of appropriations of water for instream recreational uses.
- c. Whether the water court erred in awarding the applicant a decree for an amount of water in excess of the minimum amount necessary for a reasonable recreation experience.
- d. Whether the water court erred in overturning the CWCB's presumptively valid Findings and Recommendations that 250 c.f.s. was the minimum stream flow necessary for a reasonable recreation experience.
- e. Whether the water court erred in finding that up to 1,500 c.f.s. was the minimum stream flow necessary for a reasonable recreation experience when there was no support for such finding.
- f. Whether the evidence supports a finding that 1,500 c.f.s. would not impair Colorado's ability to fully develop and put to beneficial use its compact entitlements and allows maximum utilization.
- g. Whether the water court erred in determining that the rebuttable presumption in favor of the CWCB's Findings and Recommendations was overcome, despite the applicant's concession that 250 c.f.s. did promote maximum utilization and did not impair compact entitlements.
- h. Whether the water court erred in determining that the rebuttable presumption does not apply to the conclusions and conditions contained in the CWCB's Findings and Recommendations.

- i. Whether the water court erred in holding that the CWCB did not find “that at any of the levels requested by the Applicant [that] this RICD will impair Colorado’s ability to fully develop and put to beneficial use its compact entitlements [and] . . . is consistent with maximum utilization.”

Currently, the CWCB and the UGRWCD are in the process of filing the formal trial court record with the supreme court. The CWCB’s opening brief is due 45 days after the parties file the record. On March 16, 2004, the River District entered its appearance and, as directed by the Board at the January meeting, we plan to maintain the same positions on appeal that we asserted at trial.

### **3. Aspinall Unit EIS Process.**

Each of you should have received a copy of the River District’s recent scoping comments on the Aspinall Unit NEPA process that has been initiated by the USBR to determine whether the Aspinall Unit can be operated to meet the fish flows recommended by the Upper Colorado River Endangered Fish Recovery Program. “Scoping” is the first step in the NEPA EIS process and is meant to help the federal agency delineate the issues to be addressed in the EIS. We have consistently maintained that the federal agencies (USBR and the Fish & Wildlife Service) must commit to preparing a basinwide “programmatic biological opinion” (“PBO”) contemporaneously with the Aspinall Unit EIS. The primary reasons for our position are:

- a. The fish flows, if implemented as recommended by the Recovery Program, would impact all Gunnison River Basin water users, not just the Aspinall Unit.
- b. Operation of the huge Aspinall Unit has potentially very significant impacts on the other federal and private water projects in the Gunnison River Basin. The size and location of the Aspinall Unit make it particularly well-suited to serve as the primary water supply component of a basinwide PBO for the endangered fish.
- c. Endangered Species Act compliance for the Aspinall Unit alone, in the absence of a PBO, would present a serious threat of additional, unattainable ESA demands on the smaller federal Reclamation Projects in the basin (*i.e.*, Taylor Park/Uncompahgre, Fruit Growers, Dallas Creek, Bostwick Park, Smith Fork, and North Fork), and on the thousands of non-Federal water users in the Gunnison Basin.
- d. The United States, the State of Colorado, and Gunnison Basin water users have long-agreed that the Aspinall Unit will serve as the primary component of a basinwide PBO, which would include the Dolores Project in the adjacent Dolores River Basin.

An important issue that the Board may wish to consider is whether to request “cooperating agency” status from the Bureau of Reclamation. A “cooperating agency” is usually a federal agency other than the lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a major federal action significantly affecting the quality of the human environment. However, a state or local agency of similar qualification may become a cooperating agency by agreement with the lead agency. We believe the River District is fully qualified to be a cooperating agency due to the specialized expertise of River District staff on many of the issues to be considered in the EIS. The River District has particular expertise in water rights administration in the Gunnison River Basin, historical agreements and reservoir operating plans in the basin, and the Upper Colorado River endangered fish species.

The primary benefits of being a cooperating agency include a much greater ability to participate, comment, and provide substantive input on preliminary drafts of the EIS than is provided to other interested parties. The obligations of a cooperating agency include (1) participating in the NEPA process at the earliest possible time, (2) participating in the scoping process, (3) assuming, on request of the lead agency, responsibility for developing information and preparing environmental analyses including portions of the EIS concerning which the cooperating agency has special expertise, (4) making staff support available at the lead agency’s request to enhance the latter’s interdisciplinary capability, and (5) using its own funds. In addition to the resource commitments, a potential drawback of being a cooperating agency is that there may be a perception that it would be more difficult for the River District to distance itself from or challenge a preferred agency alternative with which the River District did not concur.

There clearly are important River District resource issues to consider (expenses and personnel time) if the River District becomes a cooperating agency. *However, given the importance of this NEPA process, we recommend that the Board direct staff to seek cooperating agency status for the Aspinall Unit EIS. The Board may wish to discuss this and other matters related to the Aspinall Unit EIS in executive session.*

#### **D. South Platte River Basin.**

##### **1. City of Longmont RICD Application, Case No. 01CW275, Water Division 1.**

The River District filed a statement of opposition in Longmont’s RICD application. Our primary concern is to ensure that the RICD right does not unreasonably interfere with the ability of water users in the St. Vrain River Basin to exchange their reusable water supplies in order to reduce or eliminate their future demand for transmountain water. The primary parties in the case (Longmont and the CWCB) put the case on the back-burner pending a decision by the Colorado Supreme Court in the Golden kayak course case, so nothing happened in the case until recently. Longmont and the CWCB staff apparently have agreed to a proposed ruling (subject to approval by the CWCB at its May meeting in Steamboat). Longmont has asked the River District to consent to the same proposed ruling. A copy of the proposed ruling is included in your Board material as Attachment F. *This matter is discussed further in the Confidential Report.*

## **2. Draft EIS on Platte River Endangered Species.**

The USBR and the U.S. Fish and Wildlife Service prepared a joint draft Programmatic Environmental Impact Statement ("DEIS") dated January 23, 2004, on the impacts of a proposal submitted by Nebraska, Colorado and Wyoming, water users and environmental interests to benefit the Platte River endangered species located in Nebraska. The important part of the DEIS from a West Slope perspective is that the preferred alternative proposes to limit the use of reusable return flow on the Front Range (meaning the reusable water, including reusable transmountain return flow, would flow down the South Platte River into Nebraska). We are concerned that this proposal eliminates the future ability of Front Range water users to implement reuse programs and would increase the future demand for transmountain water from the West Slope. Accordingly, we plan to work with River District staff to submit comments on the DEIS in June.

Attachments:

- A. Confidential Report, dated April 9, 2004
- B. Memorandum re: Water Quality Matters, dated April 8, 2004
- C. Confidential Report and Recommendations on Water Division 6 Conditional Water Rights, dated April 2004
- D. Decree in Case No. 03CW24, Water Division 6
- E. Decree in Case No. 03CW30, Water Division 6
- F. Proposed Ruling in Longmont RICD, Case No. 01CW275, Water Division 1